Dear Ms. Foley:

Z-Tel offers the following suggestions on the draft order:

1. (page one, paragraph one): A participant can mark information "confidential" by simply claiming, as opposed to affirming through an officer, that information is "sensitive."

   If a party stamps a great deal of material confidential, we could see delay because clause 3(b) (page two) requires five business days advance notice in writing to counsel of the party designating information as confidential before disclosure to a non-employee consultant or the client. "[C]laimed by the producing participant" on lines four and five of paragraph one should be changed to "affirmed by an officer of the producing participant." We would also propose to delete the word "sensitive" on line five.

2. As indicated, paragraph 3(b) on page two could result in delay because, notwithstanding agreements to comply with the protective order, counsel for a competitor may not share confidential information with a consultant who is employed by the competitor without giving five business days advance notice to counsel for the entity that designated the information as confidential. A balance might be struck by deleting "or" on line two of 3(b) and replacing it with a comma and adding "or an expected witness or affiant working with the attorney in the proceeding" and reducing five business days to twenty four hours or two business days. Our other concern is that an attorney has to be able to communicate with the client and this provision would appear to require notice before the attorney may share information with the client—if that sharing is permitted at all (see below).
3. (Paragraph 5, page 3) The draft order would allow a party to escape any requirement to share information by alleging (line 3) that the information is highly sensitive and that access in copying would expose the entity to "an unreasonable risk of harm." Clause six allows the entity to prohibit copying without deeming the material "highly sensitive." If risks associated with copying can be avoided without the extreme remedy of non-disclosure, risks of copying should not be a basis for non-disclosure.

   Further, inasmuch as non-disclosure to parties to the protective order could considerably slow the proceeding, a party electing this paragraph should have to affirm by affidavit from an officer that access to the confidential information under the terms of the protective order would be likely to harm the company. The affidavit should also specify the type of harm that would be suffered.

4. (Clause 6) Prohibited Copying. If an entity is going to prohibit copying and thereby impede use of information for purposes of the proceeding, it should have to affirm, with specificity, how, notwithstanding compliance with the protective order, copying would harm the entity.
5. The first and second sentences of paragraph nine allow persons obtaining access to confidential information in the Massachusetts proceeding to use the material in court without making best efforts to provide the material under seal or in some other manner that would protect its confidentiality (sentence one). While the second sentence requires individuals to file the material under seal "in this proceeding," it probably should extend the requirement to "in this or any other proceeding (as permitted)."
6. Paragraph 12 on page 6 suggests that counsel is free to render advice to clients, but "should not make specific disclosure of any items so designated except pursuant to the procedures of paragraph 3 above." Paragraph 3's list of eligible individuals ("counsel of record," "in-house counsel . . . actively involved," "partners, associates, secretaries, paralegal assistants and employees of such counsel," "outside consultants or experts . . . under the supervision of the counsel of record," "in-house economists and regulatory analysts . . . under the supervision of the counsel of record" and department employees) does not include the client. Even if it did include the client, the five day rule of paragraph 3(b) (discussed above) could impede client decisionmaking. If "client" is included in the first paragraph of paragraph 3, and 3(b) is

modified as recommended above, this impediment to attorney/client communication would be reduced.

Sincerely,

Lawrence G. Malone